In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1436

EDWARD WHITE AND ALFRED BLUMBERG, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

After a trial in the United States District Court for the Southern District of New York, petitioners were found to have violated, and to have aided and abetted others in violating, the registration provisions of the Securities Act of 1933, 15 U.S.C. 77e, and the anti-fraud provisions of that Act (15 U.S.C. 77q(a)) and the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 issued thereunder, 17 C.F.R. 240.10b-5 (Pet. App. B, pp. 5a-7a; 375 F. Supp. 465). Petitioners were permanently enjoined from violating those provisions (Pet. App. B, pp. 5a-7a). The court of appeals affirmed *per curiam* (Pet. App. A, pp. 1a-4a).

1. In September 1967, the Securities and Exchange Commission sought permanent injunctions against 43 defendants, including petitioners, alleged to have violated the registration requirements of the Securities Act of 1933[1], and the anti-fraud provisions of both that Act[2] and the Securities Exchange Act of 1934,[3] in connection with the offer and sale of securities issued by North American Research and Development Corporation. The Commission promptly moved for a preliminary injunction before then District Judge Mansfield, who granted the Commission's motion as to some defendants and denied it as to others. *Securities and Exchange Commission* v. *North American Research & Development Corp.*, 280 F. Supp. 106 (S.D. N.Y.). On appeal, the court of appeals (424 F.2d 63 (C.A. 2)) affirmed the district court order insofar as it granted preliminary relief against 14 defendants, including petitioner White, and reversed insofar as it denied preliminary relief against four defendants, including petitioner Blumberg.

On July 14, 1972, the district court (per Judge Motley) denied the Commission's motion for summary judgment against petitioners (*Securities and Exchange Commission* v. *North American Research and Development Corp.*, 59 F.R.D. 111 (S.D. N.Y.)). On June 27, 1973,

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[1]Section 5(a) and (c), 15 U.S.C. 77e(a) and (c).

[2]Section 17(a), 15 U.S.C. 77q(a).

[3]Section 10(b), 15 U.S.C. 78j(b); Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5.

the trial was held before Judge Weinfeld on the Commission's request for permanent injunctive relief.[4]

At trial, the Commission substantially relied on the evidence that had been admitted in the 1967 hearing on its request for preliminary injunctive relief. In addition to introducing the record of that proceeding, the Commission called petitioners as witnesses. Petitioners called no witnesses and did not testify in their own behalf.

The district court concluded (Pet. App. C, p. 13a) that based "[u]pon the entire record" petitioners had violated the federal securities laws and should be permanently enjoined. The court found that petitioner White was the "central figure, if not the mastermind" of (Pet. App. C, p. 15a), and that petitioner Blumberg "played an active and knowing role in aiding and abetting the principals" in, a fraudulent scheme whereby a public distribution of stock of an inactive corporation without assets was accomplished by use of a materially false and misleading "Progress Report" (*id.* at 19a-23a).

2. Petitioners' sole claim is that they were denied a fair trial by the district court's admission into evidence of the record of the prior preliminary injunction pro-

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[4]At the time of trial, only 4 of the original 43 defendants remained in the case—petitioners, and K. Ralph Bowman and North American Research and Development Corporation. Since the district court had previously granted the Commission's motion for summary judgment as to Bowman and North American on the question whether they had violated the securities acts (59 F.R.D. 111, 115), the only issue concerning them at trial was whether permanent injunctive relief should be granted.

Of the other original defendants, permanent injunctions had been entered against 21 by consent and against 13 others by default; the action had been discontinued as to three peripheral participants who executed undertakings to comply with the registration and antifraud provisions of the securities laws; and the complaint had been dismissed as to one corporate defendant after the death of its principal officer. One person named as a defendant in the complaint—a Canadian citizen—was never served.

ceedings. This contention was correctly rejected by the court of appeals, on whose opinion we principally rely.

Petitioners' contention (Pet. 8) that they did not know at the time of the preliminary injunction proceedings that evidence admitted therein could be used at the trial on permanent relief is baseless. As the court of appeals noted (Pet. App. A, p. 3a): "Rule 65(a)(2) [Fed. R. Civ. P.] itself gives notice that this may be done."[5]

Petitioners' suggestion (Pet. 7-12) that, because the evidence at trial consisted substantially of the record of the preliminary injunction proceedings, they were deprived of a trial on the merits regarding permanent relief is equally baseless.[6] Petitioners were informed by the district court that the prior record would be admitted, and they were not precluded from objecting to any portion of it on evidentiary grounds, recalling witnesses for cross-examination, or presenting an affirmative defense. Indeed, having knowledge that the Commission intended to rely on the prior record, petitioners had the unusual advantage of being able to plan their defense to respond to the evidence they knew the record to contain. See *Carter-Wallace, Inc.* v. *Otte*, 474 F.2d 529, 537 (C.A. 2). For reasons best known to themselves, they chose not to pursue these options and they cannot now seek to be relieved of the consequences of their decision.

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[5]Rule 65(a)(2), Fed. R. Civ. P., provides in relevant part:

> * * * any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.

[6]Petitioners' reliance (Pet. 9-11) on decisions holding that permanent relief cannot be granted in proceedings in which a party has no notice that such relief will be considered is misplaced. The permanent injunctions at issue here were granted after a trial whose primary purpose was the adjudication of the Commission's request for permanent relief, and petitioners had ample notice of that purpose.

As the court of appeals noted (Pet. App. A, p. 4a, n. 4): "Appellants [petitioners] have now had their trial before Judge Weinfeld. It is no denial of due process if they chose not to present any evidence there."[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DAVID FERBER,
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JUNE 1975.

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[7]Petitioners' suggestion (Pet. 12) that the delay between the trials on preliminary and permanent relief impaired their ability to present a defense is not supported by the record. While they imply that witnesses could not be located (*ibid.*), there is no indication that any attempt was made to call witnesses.